No. 87-1869

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Our petition demonstrated that the decision of the court of appeals is both erroneous and important.[1] That decision, if allowed to stand, will adversely affect the development of Alaskan oil reserves and seriously and irreparably injure the vital economic interests of Alaskan Natives that were conferred by Congress in the Alaska Native Claims Settlement Act. The court below, although holding that petitioner suffered present injury, nonetheless upheld dismissal of petitioner's complaint after nearly a decade of administrative litigation, thereby allowing FERC to avoid a decision on the merits and treat as "uncontested" a settlement that petitioner hotly contested as producing excessive rates. All petitioner seeks is a reasoned decision by FERC, based on substantial evidence, as to the lawfulness of TAPS rates.

Respondents go to great lengths to obscure this fundamental issue. Their briefs contain a regrettably distorted and misleading presentation of the case. In fact, they have constantly shifted their grounds for resisting a decision on the merits, starting with the belated assertion that petitioner lacked standing after nine years of proceedings and continuing through their latest contention that this case is confined simply to the Commission's suspension authority. Nothing in respondents' arguments, however, blunts either the unconscionable unfairness or the serious legal errors that have occurred.[2]

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[1] The court of appeals has already read its decision in this case to establish the wide "breadth of the Commission's discretion with respect to settlements." *Southern Union Gas Co.* v. *FERC*, 840 F.2d 964, 971 (D.C. Cir. 1988).

[2] FERC's brief in opposition is not filed on behalf of the United States, which is a statutory respondent in this case. See FERC Opp. 8-9 n.14. The United States also took no position in the court below on the validity of FERC's actions. See Position of the United States (D.C. Cir. filed July 14, 1987). Indeed, the United States explained that it had "supported the settlement offer on the condition that it be adopted as the 'complete and final resolution and

1. Respondents' contention that FERC had discretion to terminate the proceeding without deciding the merits of petitioner's challenges to the TAPS rates is based on the clearly incorrect assertion that the ICC "initiated the proceedings on its own motion under Section 15(7)" (FERC Opp. 14; see also Owners Opp. 13). The ICC's order plainly states that the Commission had "given careful consideration to the protests" filed by petitioner and other parties and, based on the protestants' submissions, had concluded "that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) * * *." *Trans Alaska Pipeline System*, 355 I.C.C. 80, 80 (1977). See also *id.* at 81, 87.

Thus, it has been recognized from the very outset that the proceeding was being conducted pursuant to Section 15(1) as well as Section 15(7) to determine just and reasonable TAPS rates in response to the objections filed by petitioner and the other complaining parties.[3] This Court too has understood the proceeding in this way. See *Trans Alaska Pipeline Rate Cases ("TAPS I")*, 436 U.S. 631, 636, 637 n.15 (1978) (the ICC "cited the protestants' arguments" and "instituted a formal adjudicatory investigation into the lawfulness of the suspended rates pursuant to 49 U.S.C. § 15(1)"). See also Pet. App. 12a.

This background is fatal to respondents' position. The ICC commenced the proceeding, upon consideration of the complainants' challenges, *under Section 15(1)*. In turn, Section 15(1) explicitly incorporates the provisions of

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order of the Commission in the [*TAPS*] dockets as to all parties and all issues outstanding in these dockets,'" which condition would be fulfilled (in the absence of a decision on the merits) only if FERC was correct in its conclusion that petitioner did not "presently ha[ve] standing to contest the TAPS rates" (*id.* at 1)—a conclusion that the court of appeals expressly overturned.

[3] See, *e.g.*, ALJ's Report and Order on Pre-Hearing Conference (Aug. 17, 1977), at 1, 2 (C.A. Supp. App. 16, 17); ALJ's Initial Decision on Phase I Issues, *Trans Alaska Pipeline System*, 10 F.E.R.C. (CCH) ¶ 63,026 (1980), at 65,175, 65,221 (C.A. Supp. App. 34, 80).

Section 13 by referring to proceedings "upon a complaint made as provided in section 13 of this title." 49 U.S.C. § 15(1). Accordingly, it is abundantly clear that the ICC initiated this proceeding based upon the complaints of petitioner and others, not *sua sponte*, and that in doing so it was subject to the duty under Section 13 to decide the merits of the case.

Contrary to its current position, FERC has previously recognized the applicability of Section 13 to this proceeding. This is most clearly seen in the Commission's treatment of petitioner's argument that it was entitled to a decision on the merits under *ICC* v. *Baird*, 194 U.S. 25 (1904)—one of the leading Section 13 decisions (see Pet. 21)—and Section 13(2), which provides that a complaint shall not be dismissed "because of the absence of direct damage to the complainant" (49 U.S.C. § 13(2)). FERC's response to this argument was *not* that Section 13 authorities were irrelevant but rather that petitioner lacked standing because it was not injured:

> [Section 13 as construed in *Baird*] merely recognizes the possibility of indirect damage. However, it in no way bars a dismissal where, as here, there is *no* immediate damage.

Pet. App. 40a n.51 (emphasis in original).[4] Furthermore, the Commission conceded that petitioner would be "*entitled*" (*id.* at 27a (emphasis added)) to a decision on the merits as soon as it was aggrieved (*id.* at 27a, 41a, 43a).[5] At no time prior to its brief in opposition has the Commission ever suggested that this proceeding is entirely a discretionary matter.

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[4] In light of Section 13(2), it was necessary for the Commission to find that there was *no* injury to petitioner and not simply (as the court of appeals subsequently concluded) that the injury was not sufficiently immediate and direct. See pages 9-10, *infra*.

[5] Significantly, FERC's conclusion was based on *United Municipal Distributors Group* v. *FERC*, 732 F.2d 202 (D.C. Cir. 1984), which was begun as a suspension proceeding (*id.* at 204).

Even if the ICC's order had not explicitly cited Section 15(1), it has long been the consistent practice that when the Commission orders a suspension and commences an investigation under Section 15(7), the parties are entitled to a determination of just and reasonable rates. As the ICC explained over a half-century ago:

> *The proceeding is primarily into the lawfulness of what the carriers have proposed; suspension is an incident.* * * * We have held in such cases when brought upon complaint that looking to the substance, the complainant is *entitled to a finding whether or not the expired rates were violative of the act.* * * * [O]ur *duty* [is] to accept the issue tendered by the parties, and to determine it upon the record they have submitted.

Excursion Fares Between Chicago and Twin Cities, 178 I.C.C. 742, 743-744 (1931).

This administrative scheme is reflected in Rule 42 cited by the TAPS owners (Opp. 13-14). Because a Commission decision to suspend and investigate rates automatically triggers the procedure for an ultimate resolution on the merits, Rule 42 recognizes that it is unnecessary for a protesting party to file a formal complaint. However, if a tariff has not been suspended, the Rule provides that "a separate later formal complaint or petition should be filed" if "a protestant desire[s] to proceed further against [the rates]." 49 C.F.R. § 1100.42 (a) (1976). The regulatory framework thus recognizes that a proceeding on the merits is the same however it is begun and entitles a participating party to a decision on the lawfulness of the challenged rates.[6]

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[6] The TAPS owners repeatedly assert (Opp. 5, 11, 15 & n.19, 16, 21, 28, 29, 30) that the TSM rates have superseded the originally filed rates and therefore that the proceeding is not adequate to determine ongoing TAPS rates. If this assertion were correct, a carrier could always evade a ratemaking decision by unilaterally filing new tariffs that keep one step ahead of the administrative process. But in fact the owners' assertion is incorrect. First, in ordering this proceeding, the ICC specifically directed that "[i]n the

Southern Ry. Co. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), upon which respondents rely (FERC Opp. 15; Owners Opp. 14), simply held that the decision *not* to investigate a temporary suspension request under 49 U.S.C. § 15(8)(a) is unreviewable. Here, Section 15(1) was exactly intended to "augment[]" the remedies available in a Section 13 proceeding (*TAPS I*, 436 U.S. at 640) rather than to be an "independent" provision (*Southern Ry.*, 442 U.S. at 463), and the express language of Section 15(1) demonstrates the "linkage" between the sections that was absent in *Southern Ry.*

Respondents are equally incorrect in asserting that our position would require the Court to overrule its decisions that recognize the Commission's discretion concerning the temporary suspension of rates under Section 15(7) (FERC Opp. 15; Owners Opp. 14-15 n.18). Most important, as explained in the petition (at 23 n.5), the language of Section 15(7) is permissive—the Commission "may * * * suspend" rates (49 U.S.C. § 15(7))—in contrast to the mandatory nature of Section 13 (as incorporated by reference in Section 15(1))—"it shall be the duty of the Commission to investigate" (49 U.S.C. § 13(1)). Nothing in our argument casts the slightest doubt on the Court's decisions under the quite different provision in Section 15(7).

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event the schedules here under investigation are changed, amended or reissued, * * * such changed, amended or reissued schedules will be included in this investigation" (355 I.C.C. at 87). See also *Excursion Fares*, quoted at page 4, *supra*. Moreover, at the heart of this proceeding is the establishment of a ratemaking *methodology*, not merely particular rates for individual years. Finally, this Court has held that the administrative process is not to be frustrated by the inherent lag in agency proceedings. See *Bowman Transp.* v. *Ark.-Best Freight System*, 419 U.S. 281, 294 (1974):

> [While w]e appreciate the difficulties that arise when the lapse between hearing and ultimate decision is so long * * *, we have always been loath to require that factfinding begin anew merely because of delay in proceedings of such magnitude and complexity.

In the end, respondents' view of the statutory structure would drastically rewrite the Interstate Commerce Act. The danger in respondents' position is that it broadly extends FERC's previously cabined discretionary authority for the temporary suspension of rates under Section 15(7) and transforms it—retroactively, after nine years of adversarial proceedings—into an all-purpose discretion to avoid a decision on the merits. Section 15(7) is not an escape valve from the Commission's mandatory jurisdiction to determine just and reasonable rates. Respondents' efforts to re-label this proceeding at the eleventh hour should not be permitted to deprive petitioner as a proper complaining party of its rights under the Act.

2. FERC's own regulations require it to resolve objections on the merits before approving a contested settlement. See Pet. 24-28. Respondents counter (FERC Opp. 17-18; Owners Opp. 22 n.29) that FERC has no such obligation because under Rule 602(h)(1)(i) the Commission "may" decide the merits of contested settlements. That Rule, however, simply grants FERC the discretion to consider a contested settlement on the merits as an alternative to the litigated proceedings that would otherwise occur. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 312 (1974); 44 Fed. Reg. 34,936, 34,938 (1979) (contested settlements "may be considered and approved or disapproved if the record contains substantial evidence upon which to base a reasoned decision"). It in no way authorizes the Commission to approve a contested settlement except by adopting it as a decision on the merits.[7]

Perhaps even more telling than this faulty contention is the utter lack of any precedential support for respondents' position. *Respondents have failed to cite a single*

[7] Our argument also does not render subsections A and B of Rule 602(h)(1)(ii) "wholly redundant" (Owners Opp. 22 n.29). Contrary to the owners' assertion, the Commission can obtain a record on which to base a "substantial evidence" decision through means other than an evidentiary hearing before an ALJ, *e.g.*, by admissions, stipulations, or submission of an agreed record.

instance in which the Commission has sought to approve a contested settlement, or a court of appeals has upheld such an approval, that did not involve a decision on the merits. This unbroken practice is a powerful rebuttal to respondents' facile arguments.[8]

3. In answer to our due process argument (Pet. 17-20), respondents assert that no interest protected under the Due Process Clause is implicated here because the court below found that petitioner was only " 'potentially' " affected (FERC Opp. 16; Owners Opp. 18 n.24). The court found no such thing; rather, it held that petitioner suffered "present injury" and "injury in fact" (Pet. App. 10a n.10), and that "the settlement currently affects Arctic's interests" and has an "assuredly real * * * impact * * * on Arctic" (*id.* at 17a, 18a n.20). Moreover, this adverse effect is immediate, substantial, and irreparable: excessive TAPS rates are *currently* depriving petitioner of many millions of dollars in revenues from its leases and deterring the development of its oil holdings, and these injuries *cannot be remedied* under the statutory provision for reparations to shippers.

Respondents are not helped by their allusion to the amorphous "balancing" of interests that the court below engaged in (FERC Opp. 17). "[A]s long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss* v. *Lopez*, 419 U.S. 565,

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[8] Despite respondents' blind insistence, *United* does not support a different conclusion. The nonconsenting party in *United* was given an immediate hearing at which its legal rights would be fully protected by a decision on the merits of its claims. That is precisely what petitioner has sought—and been denied—in the present case. See Pet. 26-27.

Likewise, *El Paso Natural Gas Co.*, 25 F.E.R.C. (CCH) ¶ 61,292 (1983), which FERC cites (Opp. 11 & n.16), is fully consistent with our position. In that case, the nonconsenting parties' only objection was resolved in their favor (*id.* at 61,673). Moreover, the settlement at issue related solely to other parties in a consolidated proceeding (*ibid.*).

576 (1975). Respondents cite no decision holding that the procedural rights of a litigant can be overridden—and present, substantial, and irreparable injury thereby imposed—on the asserted policy ground that other parties have a more direct interest that is entitled to greater weight.

Respondents' extended discussion of the proceedings that FERC conducted (Owners Opp. 19-20) is similarly beside the point. Petitioner's opportunity to be heard was reduced to naught when the Commission refused to consider the lawfulness of TAPS rates. A party's due process right to " 'a hearing on the merits of his cause' " (*Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982)) is meaningless if it does not include the right to a decision.[9]

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[9] The TAPS owners also make a number of assertions that have no bearing on the issues presented in the petition. For example, they suggest (Opp. 2) that the $9 billion cost of pipeline construction was prudent and justified by special circumstances (even though those circumstances were known at the time of the initial cost estimate of $1 billion). Likewise, the owners state (*id.* at 6, 10, 19 & n.25) that the TSM rates are only a ceiling and that actual rates will be lower (even though petitioner's expert evidence shows that the settlement contains features that will drive the actual charges up to the level of the ceilings). These contentions go to the merits, however, which are not now at issue. Indeed, it is precisely FERC's refusal to decide the merits that is the gravamen of our petition. Suffice it to say that petitioner disagrees with, and has adduced record evidence to controvert, the owners' claims on the merits.

FERC (Opp. 5, 11) and the TAPS owners (Opp. 2, 6 & n.8, 10-11, 29) also proudly proclaim that the settlement provides for declining rates over time. What they fail to mention, however, is that both the ratemaking methodology adopted by the ALJ's initial decision on Phase I, and the methodology proposed by petitioner, have declining rate profiles as well and in fact produce rates that are consistently below those set by the settlement methodology. See C.A. App. 1387. While the TAPS owners note (Opp. 5 n.7, 17) that the initial decision does not conform to ratemaking standards subsequently adopted by the Commission, that development largely involves a mathematical conversion and does not alter the comparison between initial decision rates and TSM rates.

4. In a blizzard of misleading quotations and administrative citations, respondents stubbornly insist (FERC Opp. 11-13; Owners Opp. 25-28) that the "balancing" approach of the court of appeals rests on the same rationale that FERC had adopted. Nothing could be further from the truth.

It is crystal clear that FERC, in dismissing petitioner and approving the settlement as uncontested, based its decision solely on the ground that as a matter of law petitioner was not aggrieved. The Commission itself expressly explained its decision in exactly those terms (Pet. App. 24a (emphasis added)):

> As discussed below, the Commission finds that since it is not imposing the settlement on Arctic, *Arctic's interests are not affected* by it. *Accordingly, its opposition to the settlement is moot. Since* the result of the settlement does not present any current, genuine, material issues, we may dispose of the matter before us by treating the Amended Settlement Agreement as an *uncontested settlement.*

This reasoning is repeated time and time again in the Commission's order.[10] Thus, the Commission "conclude[d] that Arctic has not shown any present or immediate harm or demonstrated any 'immediate prospect of future in-

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[10] See, *e.g.*, Pet. App. 26a n.17 ("[a]pproval of the settlement does not in any way affect Arctic's rights"); 34a ("Arctic is not at the present time aggrieved by the settlement"); 36a (emphasis omitted) ("Arctic is [n]ot [a]ggrieved by the [s]ettlement"); *ibid.* ("Arctic must be particularly 'aggrieved' by the settlement in order to legitimately challenge the settlement on the merits"); 38a ("the settlement will not cause any real harm to Arctic[]"); 39a n.47 ("we have concluded that the TAPS settlement tariffs do not affect [Arctic]"); 41a n.54 ("the absence of Arctic's aggrievement"). In fact, it was on the theory that petitioner was not aggrieved that the Commission sought to distinguish this Court's decisions in *Baird* (see Pet. App. 40a n.51) and *City of Chicago* v. *United States*, 396 U.S. 162 (1969) (see Pet. App. 34a & nn.33, 34), as well as the *United* decision (see Pet. App. 27a) "in *United* * * * the objecting parties were entitled to an immediate hearing on the merits * * * because [they] had immediate interests")).

jury' to its interests. * * * Consequently, we approve the settlement, and terminate the proceeding without prejudice" (*id.* at 38a, 40a). This understanding of FERC's decision is confirmed by the Commission's explicit recognition that "[i]f, and when Arctic is actually aggrieved, it may contest TAPS' rates" (*id.* at 41a).

There is not a shred of support for respondents' assertion that FERC engaged in the sort of balancing of interests and exercise of discretion on which the court below rested its decision. Rather, as the court observed, FERC's rationale was that it "discerned no present aggrievement on Arctic's part by virtue of the settlement" (Pet. App. 8a). FERC's statement that a contesting " 'party's interests [must be] *immediately and irreparably affected*' " (*id.* at 36a (emphasis in original)), which respondents stress (FERC Opp. 12; Owners Opp. 27), simply recites the standing test it was applying and does not represent a discretionary weighing of interests.

Indeed, that statement is immediately followed by a crucial passage that makes the Commission's rationale indisputable (Pet. App. 36a (first emphasis added)):

> Arctic must be particularly "aggrieved" by the settlement in order to legitimately challenge the settlement on the merits. *The courts have fashioned a test to determine judicial standing which we think is appropriate in this context as well.* The test is whether a party "has sustained an injury *in fact* to an interest arguably within the zone of interests protected or regulated by the [Interstate Commerce Act]."

It is therefore patently not the case that FERC "analogized" its standard to that of judicial standing (FERC Opp. 12) or that the issue of petitioner's aggrievement was "subsidiary" (Owners Opp. 27). FERC's conclusion that petitioner was not aggrieved and therefore failed to meet the test for judicial standing was the sole and determinative basis for its decision—a basis that the court of appeals squarely reversed. See Pet. 9-10, 16.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment of the court of appeals with respect to Question 2 presented in the petition.

Respectfully submitted.

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